In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-858

GOULD, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Gould, Inc., Petitioner herein, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit, entered in this case on October 26, 1976, granting enforcement to an order issued against Petitioner by the National Labor Relations Board.

OPINIONS BELOW

The Order of the Court of Appeals (App., infra, pp. A1-A2) is reported at ..... F.2d ..... The findings of fact, conclusions of law, and order of the National Labor Relations Board are reported at 216 NLRB #183 (App., infra, pp. A2-A9).

JURISDICTION

The Order of the Court of Appeals was rendered on October 26, 1976 (App., infra, pp. A1-A2). The Motion for Stay for Mandate Pending Application for Certiorari was granted November 8, 1976 to forty-five (45) days. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and §10(e) and (f) of the National Labor Relations Act, as amended, 29 U.S.C. §160(e) and (f).

QUESTION PRESENTED

Under the "substantial evidence on the record as a whole", test established in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), can findings of fact and conclusions of law be based upon inferences uncorroborated by direct or circumstantial evidence where direct evidence corroborated by disinterested witnesses and documentary evidence as well as polygraph tests support findings of fact to the contrary?

STATUTES INVOLVED

The National Labor Relations Act, as amended, 29 U.S.C. §151 et seq., insofar as is here pertinent, provides:

> "29 U.S.C. §157: Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for purposes of collective bargaining, or for other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right

> may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).
>
> 29 U.S.C. §158(a)(1): It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7.
>
> 29 U.S.C. §158(a)(3): By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . ."

STATEMENT OF THE CASE

Petitioner, Gould, Inc., herein called the Company, is an Illinois corporation, with a plant located in Cookeville, Tennessee, where it is engaged in the manufacture of heating elements for commercial and industrial comfort heating uses. The facility in Cookeville, Tennessee began operations in November of 1972.

The Union[1] began its campaign to organize the employees in August and September of 1973. On September 17, 1973, the Company discharged four employees, Anderson, Eller, Lusk and Murphy. The Union filed charges with the National Labor Relations Board alleging discrimination. After a hearing, the Board found that Anderson, Eller, Lusk and Murphy had been terminated because of their union activities.

Thereafter, the Board filed an application for enforcement of its Order with the Sixth Circuit Court of Appeals.

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1. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW.

By Order dated October 26, 1976, the Court granted enforcement of the Board's Order on the basis of substantial evidence on the record as a whole. It is this Order that is the subject of this Petition.

STATEMENT OF THE FACTS

The "Jobs Program" by which many of the employees were hired was designed to hire, train and maintain a work force made up of a high percentage of hardcore unemployed. Because of this program, the Company was forced to virtually abandon its rules of conduct set forth in the employee handbook, particularly concerning absenteeism, tardiness and employees leaving their work stations without permission. In lieu of these rules, the Company instituted an extensive counseling program for abusers. However, because of the excessive absenteeism, tardiness and employees leaving their work stations, the Company was forced into extensive overtime. Under these circumstances, Mr. Leggitt, the plant manager, instructed his staff to take strict disciplinary action against the most flagrant violators in order to correct the situation. Murphy, Lusk and Eller were terminated after extensive counseling sessions for the above stated reasons. Anderson was discharged for failing to meet the standards set for a machinist. At the hearing, in support of its Complaint of discriminatory discharge, the Board presented evidence from the four alleged discriminatees and one witness, employee Mayberry. Another employee, Hawkins, was also a witness concerning a warning given to her and in support of the employees' union activities. Thus, Anderson, Murphy, Lusk, Eller and Hawkins all had vested interest in the outcome of this case in the form of back pay and reinstatement or expunging the warning from Hawkins' record.

Aside from two preliminary meetings with the Union representative in June and August, the only other union activity was a meeting held on September 11, 1976, with six (6) people attending. They were Anderson, Murphy, Lusk, Eller, Hawkins and allegedly Mayberry. However, Mayberry, allegedly a co-instigator of the union's campaign, failed to testify, affirm or corroborate the Union meeting or any of the alleged union activities on the part of the discharges. No union cards or union literature were distributed among the employees, nor was there any talk about the Union going on about the time of the discharge. On the other hand, the Company called eight (8) co-workers of the alleged discriminatees who testified that they worked in the immediate vicinity of Anderson, Murphy, Lusk, Eller and Hawkins and that there was absolutely no distribution of literature, discussion of the Union or other union activities going on in the department of the plant before the discharges. More importantly, the undenied testimony of two (2) of these employee witnesses is that on the evening following his discharge Anderson approached them in the bowling alley and said that he had nothing to do with the Union before his discharge, but that he would now.

In addition to the testimony of these distinterested witnesses, the management and supervisory people involved in the discharges, Farris, Bittner, Looper and Leggitt, all testified that they had no knowledge of any union activities on the part of these employees or any union activities going on at the plant at any time prior to the discharges.

This case was heard in two hearings, one in February and one in May of 1974. At the conclusion of the first hearing, it was obvious that a central issue in the case would be the knowledge of any union activities on the part of the alleged discriminatees. In the interim period between the hearings, these key company officials, Farris,

Bittner, Looper and Leggitt, were all required as principal witnesses to take polygraph tests regarding their previous testimony that they had no knowledge of any union activity. These tests were administered by a professional expert in the field. The results of those polygraph tests show conclusively that neither of them had any knowledge of any union activity on the part of the dischargees or otherwise prior to the discharges. The results also showed that none of them falsified their affidavits given to the National Labor Relations Board in this particular. This evidence was admitted into the record.

With regard to the grounds for discharge noted above, aside from the management and supervisors' testimony, the Company presented an expert witness with regard to the discharge of Anderson to show that Anderson's work was not up to acceptable standards. In addition to this, the Board's own witness, Mayberry, testified that Anderson frequented his work station and engaged in lengthy discussions and that they had both been talked to about staying on their jobs, a fact that Anderson denied. Another coworker, Howard, testified that he had complained to Mr. Bittner about Anderson's poor quality of performance and interfering with Mayberry's job. Both Howard and Mayberry testified that since Anderson's discharge, there has been a harmonious atmosphere within the tool room and production has increased significantly.

With regard to the discharges of Murphy, Lusk and Eller, they had all been vigorously reprimanded for their absenteeism, tardiness and being away from their work stations. In this regard, Foreman Looper told the girls that he had talked to them about this on previous days and that they were in the process of firing themselves. In addition to this, the undenied testimony of seven (7) coworkers is that these three (3) girls were the biggest

"goof-offs" and that the employees in the department just "did not know how they got away with it". Their fellow workers testified that these three (3) employees were continually late returning from lunch breaks and rest periods.

Thus, the Board's findings are based upon the uncorroborated testimony of the most interested parties in the case. It is, as if, the Company presented no evidence in its defense. In other words, the Board completely disregarded not discredited the testimony mentioned above. In addition to this, the Board acknowledges that there was no direct evidence of Company knowledge of any union activity. However, disregarding all the evidence contrary, the Board found that the Company did have prior knowledge of union activities on the part of the dischargees based upon an inference based upon another inference. This finding is based upon three conversations: (1) Farris' alleged conversation with Anderson in June of 1973, where Farris allegedly asked him if there was any union talk; (2) Looper's inquiry to Murphy that "It's coming in, isn't it?"; and (3) Looper's statement to Hawkins that the Company knew "ninety percent of what goes on in town at night."

Although Farris' denial of the first conversation was supported by the results of his lie detector test, the Board found that the statement was made. Even so, in June, only Anderson and Mayberry talked to union representative Strickland. There was no campaign. This finding is based upon Anderson's testimony, alone. It was not until mid-September that Lusk, Eller and Murphy allegedly attended the union meeting. Thus the Board inferred from this June conversation that there was an active campaign going on, and further inferred that Lusk, Murphy and Eller were engaged in it. Then from these two inferences, that the Company was somehow aware of their activities.

The second conversation pertained to Murphy and Looper. The reference to it's coming in concerned an employee getting holiday pay and being off before the holiday. Murphy had asked Looper why employee Howell had received the holiday pay, and he replied that it was because Howell's daughter's baby was coming in the wrong way. This testimony was corroborated by Howell. Despite these uncontradicted facts, the Board inferred first that Looper was talking about the Union, and from that inference, that Looper somehow knew that Murphy was active for the Union.

The third conversation involved employee Hawkins and supervisors Farris and Looper. Both Looper and Farris denied making the statement that they knew ninety percent of what was going on in town, and were corroborated by the lie detector test. However, the Board found the statement was made and inferred that Farris and Looper were talking about employee union activities. Based upon this inference, the Board further draws the inference that Looper was specifically talking about Anderson, Lusk, Murphy, Eller and Hawkins.

With regard to the timing of the discharges, timing alone has been held not to be enough to establish Company knowledge. Other elements of Company knowledge, animus, discrimination must also be present. *MPC Restaurant Corp.*, 198 NLRB No. 12, enf'd 71 LC 13819 (C.A. 2, 1973). See also, *Cramco, Inc.* v. *NLRB*, 399 F.2d 1 (C.A. 5, 1968); and *NLRB* v. *O. A. Fuller Supermarkets, Inc.*, 374 F.2d 197 (C.A. 5, 1967). Thus, it can be seen that the Board has taken statements out of context and inferred union activities on the part of the alleged discriminatees, totally disregarding the overwhelming evidence to the contrary.

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals granted enforcement to the Board's Order on the basis of substantial evidence on the record as a whole supported the Board's findings. The Court below did so without explanation as to why or how it could disregard the substantial evidence to the contrary, supported by polygraph tests, disinterested employee witnesses, admissions pertaining to the alleged discriminatees by the Board's own witness (Mayberry), expert witnesses, and documentary records. We submit that substantial evidence cannot be based upon the uncorroborated testimony of a witness who stands everything to gain and nothing to lose in an NLRB proceeding. *NLRB* v. *Barberton Plastic Products, Inc.*, 354 F.2d 66 (C.A. 6, 1965).

REASON FOR GRANTING THE WRIT

Although this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), held that a Circuit Court could not displace the Board's choice between "fairly conflicting views", this Court went on to say that "the substantial evidence must take into account whatever the record fairly detracts from its weight", 340 U.S. at 488. In further clarifying the meaning of "substantial evidence", this Court in *NLRB* v. *Columbian Enameling & Stamping Co., Inc.*, 306 U.S. 292 (1939), said "substantial evidence is more than a mere scintilla and must do more than create a suspicion of the existence of a fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . ." 306 U.S. at 300.

As mentioned above, this case was decided as though the Company presented no defense. To the contrary, of the approximately 1,254 pages of transcript taken in this

proceeding, the Board presented its case in some 255 pages. The remaining portions of the transcript cover seventeen different witnesses presented by the Company, two of which were expert witnesses, documentary evidence as to the polygraph test, documentary evidence as to the discharges of these employees, and testimony of disinterested witnesses corroborating the Company's reasons for discharge and lack of union activity by these former employees. We submit that this Court's ruling in *Universal Camera,* supra, did not mean that the Board or the Court could totally disregard such overwhelming evidence and base its findings solely upon the uncorroborated testimony of four people who had everything to gain and nothing to lose.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Honorable Court should grant certiorari to set forth appropriate evidentiary guidelines so that substantial evidence contrary to the Board's findings will not be totally disregarded in future cases.

Respectfully submitted,

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APPENDIX

No. 75-1849

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
GOULD, INC.,
Respondent.

ORDER

(Filed October 26, 1976)

Before: EDWARDS, CELEBREZZE and PECK, Circuit Judges.

On receipt and consideration of a petition from the National Labor Relations Board seeking enforcement of its order finding violations of Sections 8(a)(1), 8(a)(3) and 8(a)(4) of the National Labor Relations Act, 29 U.S.C. § 158 (1970), and ordering remedies therefor, said decision and order being reported in 216 N.L.R.B. No. 183 (1975); and

Since substantial evidence on the record as a whole supports the Board's finding of said violations as set forth in said decision,

Enforcement is granted in all except one respect to the decision and order of the Board. We except from this grant of enforcement the Board's finding and remedy pertaining to an § 8(a)(1) violation asserted by the Board to

have occurred by the company's "telling employees it could get them any benefits that the Union could."*

Entered by order of the Court

/s/ John P. Hehman
Clerk

[Dated 3/13/75] [D—9673
Cookeville, Tenn.]

DECISION AND ORDER

On June 27, 1974, Administrative Law Judge George L. Powell issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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*We do not read this language as either a threat or a promise, and it does not appear to have been associated with any specific conduct which has not otherwise been the subject of findings and remedial action. *See National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405, 409-10n.3 (1964).

1. On June 27, 1974, the Regional Director for Region 10 of the National Labor Relations Board issued a complaint in Case 10-CA-10735 alleging additional violations by the Respondent of Sec. 8(a)(1), (3), and (4) of the Act. On July 11, 1974, counsel for the General Counsel requested the Board to consolidate that case with consolidated Cases 10-CA-10467 and 10-CA-10602 herein, and to order further hearing on these cases with Case 10-CA-10735. Thereafter, the Respondent filed a motion for summary judgment and motion for stay of proceedings or, in the alternative, requested an extension of time for filing exceptions and brief in consolidated Cases 10-CA-10467 and 10-CA-10602. On September 18, 1974, the Board, by an order of the Executive Secretary, denied the motions of counsel for the General Counsel and of the Respondent, except to the extent of granting Respondent's request for an extension of time.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge with the following modifications, and to adopt his recommended Order as modified herein.

1. We agree with the Administrative Law Judge that Respondent's discharge of employees Anderson, Eller, Lusk, and Murphy was discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act. In doing so, we reject Respondent's contention that the evidence fails to establish that it had knowledge of the union activities of any of these discharged individuals.

Although it is true that the record contains no direct evidence of Respondent's knowledge, it is well settled that knowledge can be inferred from surrounding circumstances. Thus, in addition to the reasons set forth by the Administrative Law Judge for so finding, we infer Respondent's knowledge of the union activities of the four discharged individuals from the following circumstances: (1) Person-

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2. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

The Respondent's request for oral argument is hereby denied as the record and exceptions in our view adequately present the issues and positions of the parties.

3. Respondent's no-solicitation rule restricts employee solicitation in "working areas" at *all* times, and therefore violates Sec. 8(a)(1) of the Act. Though the panel members adhere to their respective positions in *Essex International*, 211 NLRB No. 112 (1974), they find it unnecessary to pass on any further unlawfulness of the no-solicitation rule related to the "during working time" restriction.

nel Director Farris' interrogation of Anderson in June, from which it can be inferred that Respondent was receiving reports on talk among the employees about the Union, and that Farris was actively involved in ferreting out further information; (2) the timing and context of General Foreman Looper's inquiry of Murphy on September 14, "It's coming, isn't it?" only 3 days after the employees held their off-plant union meeting at Murphy's house; and (3) Looper's September 18 remarks and Farris' September 20 remarks - - - 1 and 3 days, respectively, after the discharges - - - to employee Hawkins that they knew "90 percent of what goes on in town at night," which contains its own admission that Respondent was able to keep track of its employees' union activities.

In addition, the conclusion that Respondent was aware of the union activities of the above-named individuals and was motivated to discharge them because of these activities is inescapable from the circumstances surrounding the discharges themselves: (1) 6 days after the employees met at Murphy's house to discuss the Union and sign authorization cards, and the Monday following Looper's late Friday afternoon inquiry of Murphy as to whether the Union was coming in,[4] to which she gave an affirmative response, Respondent chose to discharge four of the six employees in attendance at the union meeting at Murphy's house; (2) although the Administrative Law Judge found that Respondent had a practice of discharging employees on Friday, these four individuals were all discharged on a Monday; (3) the termination slips had not been completed for any of the discharged employees at the time they were notified they were discharged, and Superintendent of Manufactur-

4. Looper and Superintendent of Manufacturing Bittner testified that the decision to discharge the four employees was made late the same day that this conversation between Looper and Murphy took place.

ing Bittner told Anderson that he did not know what the reason for dismissal would be on that employee's termination slip when it was completed and mailed to him; and (4) Murphy and Lusk were led away from their work stations in an atmosphere of secrecy to be told they were going to be discharged, and Eller was told of her termination after being clocked out.

Nor is the unusual procedure Respondent followed in discharging the employees here explained by the seriousness of, or proximity to, the reasons asserted for their discharges. In every case, the reasons given had accumulated over a long period of time and in no instance had there been any serious recent derelictions on the part of the discharged individuals to incur the Respondent's further displeasure with their work habits or conduct. In fact, although Respondent allegedly discharged Murphy, Lusk, and Eller because of excessive absenteeism and tardiness, all three had improved upon their absentee records just prior to their discharges. And although Anderson purportedly was discharged for poor job performance and lack of work, he was never given any warning about his work performance and had in fact been complimented about his work by several of the supervisors, and after his discharge a new individual was hired by Respondent to fill his job classification. In these circumstances, we conclude, as did the Administrative Law Judge, that the reasons advanced by Respondent to explain the discharges are not credible and are pretextual in nature.

In view of the foregoing, we find in agreement with the Administrative Law Judge that Respondent had knowledge of the union activities of the discharged individuals, and discharged them for that reason rather than for the reasons asserted by it.[5]

5. Cf. *Wal-Mart Stores, Inc.*, 201 NLRB 250, 252-253 (1973).

2. The Administrative Law Judge inadvertently omitted from his Conclusions of Law, recommended Order, and notice certain 8(a)(1) violations which he specifically found in an earlier portion of his Decision. Accordingly, we shall incorporate these additional violation findings in our Order and notice.

Amended Conclusion of Law

Substitute the following for paragraph 3 of the Administrative Law Judge's Conclusions of Law:

"3. Respondent, through its supervisors, violated Section 8(a)(1) of the Act by interrogating its employees, by threatening its employees with blacklisting if they continued their union activities, by creating the impression that it was conducting surveillance of its employees' union activities, by telling employees it could get them any benefits that the Union could, and, finally, by showing its employees newspaper clippings depicting plant closings and telling them that the reason the plants closed was because the companies and unions involved could not negotiate."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that Respondent, Gould, Inc., Cookeville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Add the following paragraphs as 1(a) and (b), a reletter the remaining paragraphs accordingly:

"(a) Coercively interrogating its employees concerning their knowledge of union activity; creating the impression among employees that it has ways or means of identifying its employees who participate in union activities and of knowing what these activities are; threatening to blacklist employees so they will not be able to get another job; interfering with its employees' union activity by telling them the Employer could get them anything the Union could; coercing employees by showing them newspaper clippings of plants which closed because the companies could not negotiate with the unions.

"(b) Issuing written warnings to employees for the purpose of discouraging union activity or concerted activity protected by the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C., March 13, 1975.

John H. Fanning, Member
Howard Jenkins, Jr., Member
John A. Penello, Member

(Seal) National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we, Gould, Inc., have violated the National Labor Relations Act and we have been ordered to post this notice.

WE WILL NOT interrogate you concerning your knowledge of union activity.

WE WILL NOT attempt to, or create the impression that we are attempting to, obtain information about your union activities.

WE WILL NOT use or threaten to use our influence to prevent any of our employees from securing employment because we do not approve of their union activities.

WE WILL NOT interfere with union organization and employee union activity by telling employees that we can give anything the Union can get.

WE WILL NOT coerce our employees by showing you newspaper clippings of plants which closed because the companies could not negotiate with the unions.

WE WILL NOT issue written warnings to employees for the purpose of discouraging union activity or concerted activity protected by the Act.

WE WILL expunge from the records of Billie Hawkins the written warning we issue to her on February 8, 1974.

WE WILL NOT discharge any employee for engaging in union or concerted activity for the purpose of collective bargaining or other mutual aid or protection.

WE WILL offer to reinstate, if we have not already done so, the employees named below to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without any loss of seniority or other rights previously enjoyed, and WE

WILL reimburse them for any loss of earnings suffered because of their layoff, together with 6-percent interest.

James Anderson	Brenda Lusk
Deborah Eller	Patricia Murphy

WE WILL NOT maintain an invalid no-solicitation or no-distribution rule.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in such activities.

All our employees are free to become and remain, or to refrain from becoming or remaining, members of any labor organization.

Gould, Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peachtree Building, Room 701, 730 Peachtree Street, NE., Atlanta, Georgia 30308, Telephone 404-526-5760.

[Issued 6/27/74] [JD-448-74
Cookeville, Tenn.]

DECISION

I. Statement of the Case

GEORGE L. POWELL, Administrative Law Judge: The first issue presented by this case is whether Respondent, through its supervisors and agents, violated Section 8(a)(1) of the National Labor Relations Act, herein called the Act (29 U.S.C. Sec. 151 *et seq.*), by interrogating its employees concerning their union membership activities and desires; by soliciting its employees concerning any union activities of its employees; by promising its employees economic and other benefits if they refrained from joining or engaging in activities on behalf of the Union; threatening its employees with the loss of wages and other existing benefits if they joined or engaged in activities on behalf of the Union; by threatening its employees with blacklisting with other employers those of its employees who were active on behalf of the Union; and by creating the impression of surveillance of its employees' union activities.

A second issue is whether Respondent violated Section 8(a)(3) and (1) of the Act by discharging four of its employees, James Anderson, Brenda Lusk, Patricia Murphy and Deborah Eller, because of their membership in, and activities on behalf of, the Union.

A third issue is whether Respondent violated Section 8(a)(3), (4) and (1) of the Act in issuing a disciplinary warning to its employee, Billie Hawkins, on February 8, 1974, because of her membership in, and activities on behalf of, the Union, and because she engaged in concerted activities with other employees for purposes of concerted

activities and other mutual aid and protection, and because she gave testimony in a hearing provided for under the Act in this case.

The final issue is whether Respondent's rule as set out in its employee handbook which prohibits "Solicitation, collection or distribution without prior company approval during working time or in working areas . . ." violates Section 8(a)(1) of the Act.

For the reasons hereinafter set forth, I find that the General Counsel has established by a preponderance of the evidence that Respondent violated Section 8(a)(1), (3) and (4) of the Act and that Respondent's no-solicitation rule as published is violative of Section 8(a)(1) of the Act.

As noted in more detail below, the cases came on for trial before me in the Circuit courtroom of Putnam County, Cookeville, Tennessee, on February 7, 8, 11, 12 and 13, 1974, and May 9 and 10, 1974. Briefs were filed by Respondent and General Counsel on March 22, 1974, and June 10, 1974 relating to the respective trials.

Procedural History

A. *10-CA-1-467*

International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America, UAW, herein called Charging Party or Union, filed a charge on November 9, 1973, against Gould, Inc., herein called Respondent, with the National Labor Relations Board, herein called the Board, which resulted in a Complaint and Notice of Hearing issued January 10, 1974, by the Regional Director of Region 10 of the Board, alleging violations of Sections 8(a)(1) and (3) of the Act.

Respondent denies the essential allegations of the complaint. With the parties represented by counsel, this case was tried before me in the Circuit Court courtroom of Putnam County, Cookeville, Tennessee, on February 7, 8, 11, 12 and 13, 1974. Briefs were filed by the parties on March 22, 1974.

B. *10-CA-10602*

Subsequently, the Charging Party filed a charge on February 19, 1974, against Respondent with the Board which resulted in a Complaint and Notice of Hearing issued March 19, 1974, by the Regional Director of Region 10 of the Board, alleging violations of Sections 8(a)(3), (4) and (1) of the Act, specifically that Respondent had issued a disciplinary warning to its employee, Hawkins, because she had given testimony in the above Case No. 10-CA-10467. Respondent denied the essential allegation of the Complaint. Motion to Reopen the Record of the previous case and consolidate the two cases was granted, April 5, 1974. With the parties represented by same counsel as before, the case came on for trial before me in the same courtroom, above, on May 9 and 10, 1974. Briefs were filed by the parties on June 10, 1974.

Upon the entire record including my observations of the demeanor of the witnesses, and after due consideration of the briefs of the parties, I make the following:

Findings and Conclusions

II. Jurisdiction

Respondent, Gould, Inc., is a Tennessee corporation, with an office and place of business located at Cookeville, Tennessee, where it is engaged in the manufacturing of heating elements for commercial, industrial and comfort

heating uses. During the past calendar year, Respondent sold and shipped finished products valued in excess of $50,000 directly to customers located outside the State of Tennessee.

I find, as admitted, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

I also find, as admitted, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices Background and Summary of the Case

A. *Respondent's Anti-Union Animus*

Respondent's attitude toward unions is demonstrated by its policy of questioning prospective employees at job interviews as to their union membership or sympathies. Job applicants were told that Respondent did not have a union and did not need a union. Frank Howard, a machinist who at one time had conducted several interviews as the only representative of Respondent in Cookeville, admitted asking employees if they had been involved in any union activities, explaining that he "did not want to be responsible for hiring or being instrumental in hiring someone with a union background." He advised one applicant (Anderson) to deny the fact that he had once been the vice president of a local union if anyone asked him.

The "stated Company philosophy" concerning labor unions was also revealed by Leggitt (Manager of Manufacturing) at meetings with employees to be that Respondent did not desire to have third party representation "because we feel like we don't need anyone to speak for [the employees]."

B. *Concerted Activity and Discharges of Alleged Discriminatees*

In June 1973, employee James Anderson began talking to fellow employees about a union in the plant. He contacted the Union on August 22, 1973, and met with a union representative at his home on August 26, 1973. On August 30, Anderson and fellow employee, Mayberry, met with the union representative and signed union authorization cards. They also received literature for distribution to other employees. Anderson and Mayberry thereafter visited employees' homes seeking signatures on union authorization cards. On September 11, 1973, the first meeting of employees was held at the home of employee Patricia Murphy. Present at this meeting were Anderson, Mayberry, Murphy, Brenda Lusk, Deborah Eller and Billie Hawkins, all Respondent's employees. Authorization cards were signed by Murphy, Lusk, Eller and Hawkins.

On Monday, 6 days after the September 11, 1973, meeting, Respondent discharged Anderson, Murphy, Lusk and Eller.

At the first hearing, beginning on February 7, 1974, concerning Respondent's alleged Section 8(a)(1) and (3) violations above, Hawkins testified as the first witness for the General Counsel. The following day, on February 8, 1974, after returning to work, she was given a written warning for remaining in the restroom an excessive period of time.

Case No. 10-CA-10467, heard
February 7, 9, 11, 12, and 13, 1974

I find as admitted that the following named persons occupy the positions set opposite their names and are

supervisors of Respondent within the meaning of Section 2(11) of the Act:

W. Ray Bittner—Superintendent of Manufacturing
Bobby D. Harris—Director of Personnel
James A. Looper—General Foreman

C. *The Independent 8(a)(1) Violations*

Respondent's conduct, alleged in violation of Section 8(a)(1) of the Act, occurred as follows:

In June 1973, Director of Personnel Bobby Farris interrogated James Anderson in his office, asking him if he had heard any union talk. When Anderson replied that he had, Farris wanted to know who was doing the talking. He then asked Anderson to be sure and tell him if Anderson heard anything he thought Farris should know. Anderson's testimony is credited over that of Farris.[1]

Employee Billie Hawkins was approached by General Foreman James Looper on September 18, 1973. He showed her a newspaper clipping concerning a company in Oneida, Tennessee, which had closed after its employees had been on strike for quite some time. Looper then stated that "that's what happened with a union."

During the third week in September 1973, after the discharges, and when Anderson was trying to get employees to sign up with the Union, employee John Mayberry was told by Bittner to tell Anderson, "to lay off what he was doing if he wanted to get a job in this town;" and

1. John Hotsinpiller gave testimony concerning conversations shortly after the discharge between him, employees J. B. Davis and Farris. Davis did not testify and Farris denied the conversations. Hotsinpiller is not credited. He was biased and his story did not have the ring of truth necessary in this case, so his testimony is not reported. All other witnesses of the General Counsel are credited unless otherwise noted.

that "Bill Leggitt (chief official of Respondent) has a lot of friends."

Respondent, through its supervisors, also created the impression that its employees' union activities were under surveillance. On September 14, 1973, 3 days after the employees began meeting outside the plant, General Foreman Looper asked Pat Murphy "It's coming in, isn't it?" When Murphy asked Looper what was coming in he responded, "You know what I mean." On two occasions, September 18 and 20, Billie Hawkins was told by Farris and Looper that they knew "90% of what goes on in town at night." On October 1, 1973, during a meeting with a group of employees in Respondent's conference room, Farris told the employees that Respondent knew there were three women and one man trying to get employees to join a union and sign cards; that Anderson was employed by the Union; that Respondent knew that some union cards had been signed and that some women employees had asked him how to get their cards back.

At that same meeting, Farris also stated that Respondent did not need a union and that if a union came in, the employees would start out with nothing and would have to negotiate to something; that if the Union came in, the employees would start out at $1.60 per hour; that the Respondent could get the employees any benefits that the Union could; and showed employees newspaper clippings of plants that had unions, explaining that these plants had closed because the companies and the unions could not negotiate.

Several of the incidents described above, in and of themselves, are clearly in violation of Section 8(a)(1), such as the apparent surveillance by Respondent, *N.L.R.B.* v. *Simplex Time Recorder Co.*, 401 F.2d 547 (C.A. 1, 1968); *N.L.R.B.* v. *Rybold Heater Co.*, 408 F.2d 888 (C.A. 6, 1969),

and the threatened blacklisting of Anderson. Furthermore the totality of the conduct including the statement that Respondent could get its employees any benefits that the Union could get its employees any benefits that the Union could and the newspaper clipping incidents showing plant closings after unionization, amounts to interference with, coercion and restraint of the Section 7 rights of employees in violation of Section 8(a)(1) of the Act.

D. *8(a)(3) Violations*

The union activity of each of the four discharged employees, Anderson, Murphy, Lusk and Eller, as well as the fact that their discharges occurred 6 days after their first meeting, is set out in the background section above.

Moreover, I conclude that knowledge of that union activity is established, despite Respondent's protestations of ignorance, by the following evidence. Respondent knew of Anderson's union background from his preemployment interview and Respondent's supervisors stating on two occasions that they knew "90% of what goes on in this town at night."

1. *James Anderson*

Anderson was hired by Respondent in August 1972 as a flexatherm machine operator trainee and was abruptly terminated on September 17, 1973, only 6 days after the first union meeting. The suddenness of the discharge is highlighted by the fact that Anderson was discharged on a Monday, instead of on Friday as would normally be done, according to company policy. Anderson was led from his work station at 3:30 to Supervisor Bittner's office and then he was told he was terminated. His written termination notice had not even been completed at the time. He was told his termination slip and his vacation pay would be

mailed to him, and Bittner told him he did not know what would be on the termination slip when it was mailed.

The reasons offered by Respondent for Anderson's sudden discharge are not convincing. He was told by Bittner on the day he was discharged that he did not meet Respondent's expectations. His termination slip stated two other reasons: (1) that his job performance did not equal the standards set for machinists and (2) that the flexatherm machine operator position for which he was hired had not materialized. At the hearing, Respondent offered evidence that Anderson was a slow worker, made mistakes, left the toolroom without proper authorization, and left machines unattended. Although evidence regarding Anderson's work performance is conflicting, he had not been warned to correct his behavior or lose his job. As to the point that the flexatherm job had not materialized, the record shows that Respondent had hired a new flexatherm operator. Even assuming inadequate work performance, by Anderson, no credible explanation for his abrupt discharge, which was inconsistent with normal procedure, has been offered by Respondent. The need to get Anderson out of the plant on Monday rather than the following Friday had to do with something bigger than his work performance. Furthermore, as there is evidence that Anderson had received compliments from Instructor Howard, Supervisor Bittner and Manager Leggitt, such a valuable employee undoubtedly would have been warned and corrected from wrongdoing and not peremptorily discharged. Looper, himself, testified that Respondent was not in the business of firing employees. I find that Anderson was discriminatorily discharged for his union activity. Accordingly, his discharge violates Section 8(a)(3) and (1) of the Act.

2. *Murphy, Lusk and Eller*

Patricia Murphy, Brenda Lusk and Deborah Eller were hired by Respondent in late 1972 and early 1973. Their union activity on September 11, 1973, has been described above. Lusk and Murphy were terminated on September 17, 1973, and Eller on September 18, 1973. The reasons given for the discharges were excessive absenteeism and tardiness.

Haste, similar to Anderson's case, characterizes these discharges. The three were discharged on Monday, September 17, 1973, as was Anderson, although Eller was not at work that day and therefore was not notified until the following day. As in the case of Anderson, termination slips were not prepared at the time of the discharge.

An atmosphere of secrecy also characterized their discharges. James Looper came over to Murphy and told her to get her personal belongings, come with him and be real quiet. He led her to the door and then after clocking her out, told her she was terminated. Looper also told Lusk to get her purse and tools and come with him. He refused to explain until they had reached the timeclock to tell her she was terminated.

Eller, who was absent that day, came in the next morning, found her timecard missing and went over to collect some of her personal effects and some of Lusk's who had not been allowed to get them the day before.

As noted above, reasons for all three being terminated, as recorded on their termination notices, was "excessive absenteeism and tardiness." The transparency of Respondent's pretextual justification for the discharges was well demonstrated. Although the three did have absenteeism problems during their employment with Respondent, a marked improvement was shown during the period im-

mediately preceding the discharges. Respondent attempted to change its reason at the hearing by explaining that the three girls continuously stayed from their work stations and that this also was considered "absenteeism." However, the usual company definition for absenteeism, as was clearly shown, is limited to those occasions when the timeclock is punched late or not at all. Absenteeism and tardiness data is taken each day from the timecards and reported to the Personnel office. Absence from the work location, however, is not recorded at all. The fact that none of the termination notices mentioned wandering from the work area substantially detracts from Respondent's credibility. Neither is the suddenness of the discharges adequately explained.

The fact that the timing of none of the four discharges was satisfactorily explained makes the possibility of coincidence virtually nonexistent. In light of the nearness in time to the union meeting that they all attended, the conclusion that the discharges were discriminatory and based on their union activity is inescapable. Accordingly, the discharges of Murphy, Lusk and Eller violate Section 8(a)(3) and (1) of the Act.

Case No. 10-CA-10602 heard
May 9 and 10, 1974

The 8(a)(1), (3) and (4) violation

Billie Hawkins' employment at Gould and union activity have been pointed out above. She gave testimony at the first hearing on February 7, 1974, concerning Respondent's unfair labor practices.

Returning to work on February 8, 1974, she worked almost the whole day on an assembly line near two of her coworkers until approximately 3:10 p.m. She then

borrowed a cigarette, lit it, and said she was going to the restroom. The two other girls on her line testified that they looked up at the clock on a pole above the line and it read 2:10 p.m. [which actually indicated 3:10 since the clock had not been moved forward due to daylight savings time]. Hawkins went straight to the restroom, seeing supervisor James Looper on the way. Two other of her coworkers saw her inside the restroom but did not know what time she had come in. When Hawkins came out of the stall in the restroom, she put out the cigarette she had borrowed, washed her hands, spoke briefly to the two girls who were in the lounge, and walked out. The entire episode, from her account, could not have taken over 6 minutes. Looper stopped her on her way back to her work station and told her to come to the personnel office with him and Ken Klingler. It was then approximately 3:13 p.m.

Looper's account, diametrically at odds with Hawkins' is as follows: He saw her enter the restroom at approximately 3 minutes before 3 and decided to time how long she stayed inside. He asked Ralph Davidson and Ken Klingler what time it was and they both said 2 or 3 minutes to 3. After waiting for Hawkins for about 10 minutes he went to the first aid room located nearby and called George Harber, the personnel man at the time. Hawkins exited the restroom soon after Looper returned from the first aid room. He asked Ralph Davidson and Ken Klingler the time. Davidson told him it was approximately 10 after 3 and Klingler told him it was approximately 12 after 3.[2] Looper and Klingler then accompanied

2. It is interesting to note that both gave the same time when asked by Looper the time when Looper had told them Hawkins had entered the restroom. Neither Davidson nor Klingler had seen her enter the restroom.

Hawkins to the Personnel office for a conference with Harber.

There is little conflict in testimony over the events from then on. When the three arrived at the Personnel office, Looper told Hawkins that he was going to give her a written warning. Harber demanded that she sign the warning admitting that she had been in the restroom too long. She refused to sign and asked Looper to talk to her two coworkers who would testify that she had only been in the restroom for a few minutes. Looper refused to do so and accused her of calling him a liar. Harber then told her that she could not come back to work the following Monday.

William Leggitt, Respondent's plant manager, when told of the situation later that day, fired Harber for giving Hawkins such an ultimatum on grounds it was contrary to company policy. He then called Hawkins' mother and left a message for Hawkins to come in to work on Monday.[3]

The following Wednesday, 5 days later, Hawkins was in the conference room with Leggitt, Klinger and Looper to meet with Leggitt. Leggitt asked for her side of the story and then asked Looper for his side. Leggitt then offered to tear up the warning slip in return for her promising never to abuse the restroom policy. She again denied that she had done anything wrong and asked Leggitt to check out her story with her two coworkers. She said she wanted him to know she was not guilty of abusing the restroom policy. He said he would do so and promised to get in touch with her on Friday.

On Friday, she met again with Leggitt, this time with Ray Bittner also present. Leggitt told her that he had

3. The only phone number where Hawkins could be reached was her mother's number.

looked into it, that there were conflicting stories, and that therefore he would put the warning in her personnel file.

The record shows that the two accounts of the events result from conflicting accounts between Looper on the one hand and Hawkins and her two coworkers on the other. As to when she actually went into the restroom, neither Klingler nor Davidson remember seeing her go in and all witnesses were in substantial agreement as to when she left. I credit Hawkins' testimony for the following reasons: she declined the opportunity to have the warning slip torn up by Leggitt if she would promise not to abuse the privilege again, and she stoutly maintained her innocence and requested an investigation. Her two coworkers, who corroborated her, had little to gain and much to lose by testifying in her behalf, particularly in light of how Hawkins had been treated by Respondent the day after she had given testimony. Looper is not credited as against Hawkins and her two coworkers. Looper was the only person who testified that she was in the restroom when he asked Davidson and Klingler the time when they said 3 minutes to 3. He knew she had testified at the hearing the day before. He also testified that he did not look at the overhead clock above the duct line.

Regardless of whose story is credited, however, it is clear that Hawkins was singled out for punishment. Looper had testified that he was having a very difficult and busy day. At about 2:30 p.m., he had a problem which caused the duct line to be idle for 15-20 minutes. After getting the line back into operation, he was summonded to the toolroom to see about an electrode for a welding machine. Looper started for the toolroom because, as he himself testified, Turner's problem in the toolroom was important. Yet when he saw Hawkins go to the restroom he decided to personally time the period

she was there. On his way to the toolroom, he observed other employees going to the restroom before Hawkins. He did not time them, however, and did not know whether they had stayed in the restroom longer than Hawkins. Nor did he remember who they were.

As Looper testified that he had no personal animosity toward Hawkins and as he was not checking who else was going to the restroom and how long they remained there, I can only conclude that he checked Hawkins in a discriminatory effort to give Hawkins a written warning in order to lay the groundwork for a subsequent discharge. I conclude that he did this because she had given testimony the previous day. Clearly, this action violates Section 8(a)(1), (3) and (4) of the Act, and I so find.[4]

E. *Respondent's No-Solicitation Rule*

Respondent's plant rules for solicitation and distribution as published in its employees handbook entitled "Your Job and Ours" are as follows:

> Solicitation, collection or distribution without prior approval during working time or in working areas is strictly prohibited. This includes, but is not limited to, notices, pamphlets or handbooks.

To the extent that a no-solicitation rule can be reasonably interpreted as prohibiting solicitation in working areas on nonworking time it is presumptively invalid, absent a showing by Respondent of special circumstances or a showing by Respondent that it is necessary for production or discipline. Respondent has made no such showing. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 at 617.

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4. Respondent's use of the lie detector is interesting, but due to the type questions used and polygraphs' general unreliability I find it had little weight in the total evidence, and its conclusionary results are not adopted.

Furthermore, Respondent's rule requires that its employees obtain permission prior to any solicitation. An employer may not predicate the exercise of Section 7 rights upon its authorization, without showing that it is necessary for production or discipline. *J. R. Simplot*, 137 NLRB 1552 at 1553. Respondent has made no such showing. Respondent's no-solicitation rule, is therefore invalid and violates Section 8(a)(1) of the Act.

Upon the foregoing findings and conclusions and upon the entire record,[5] I make the following:

Conclusions of Law

1. Respondent, Gould, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. And the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. W. Ray Bittner, James A. Looper and Bobby D. Farris are supervisors within the meaning of Section 2(11) of the Act. Frank Howard was a supervisor and an agent of Respondent within the meaning of Section 2(11) and (13) of the Act when hiring for Respondent.

3. Respondent, through its supervisors, violated Section 8(a)(1) of the Act by interrogating its employees and creating the impression of surveillance of its employees.

4. Employees James Anderson, Patricia Murphy, Brenda Lusk, Deborah Eller and Billie Hawkins were engaged in concerted activity for the purpose of union organization and other mutual aid and protection, and Respondent had knowledge of this protected activity.

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5. General Counsel's unopposed Motion to Conform Exhibit, dated May 29, 1974, is hereby granted. This modifies Respondent's Exhibit No. 1, to show markings placed thereon by witness Looper in the consolidated hearings.

5. By discriminatorily discharging James Anderson, Patricial Murphy, Brenda Lusk and Deborah Eller on September 17 and 18, 1973, for engaging in protected union activities, in order to discourage membership in a labor organization, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By issuing a disciplinary warning to Billie Hawkins on February 8, 1974, because of her concerted activity and because she testified at the February 7, 1974, hearing, Respondent violated Sections 8(a)(4), (3) and (1) of the Act.

7. Respondent's no-solicitation rule as published in its manual for its employees is too broad in that it may reasonably be interpreted to bar solicitation in work areas on nonwork time, and, in that it requires employees to obtain Respondent's permission prior to any solicitation, and accordingly its publication by Respondent violated Section 8(a)(1) of the Act as it interferes with and restrains employees in exercising their Section 7 rights under the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section II, above, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

1. Having found that Respondent has engaged in unfair labor practices in violation of Sections 8(a)(1), (3) and (4) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

2. Having found that Respondent discharged James Anderson, Patricia Murphy, Brenda Lusk and Deborah Eller on September 17 and 18, 1973, and refused to permit them to work thereafter because they engaged in union activity, and in order to discourage union activity, and in order to provide a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discharges, I will recommend that Respondent be ordered to reinstate James Anderson, Patricia Murphy, Brenda Lusk and Deborah Eller to their respective former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, discharging, if necessary, anyone hired in their stead, and make them whole for any loss of earnings they may have suffered by the payment to each of them of a sum of money equal to the amount each normally would have earned as wages from September 17, 1973, to the date of an offer of reinstatement less net earnings during period, with backpay computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, including interest at a rate of 6 percent per annum to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

I shall also recommend that Respondent be ordered to remove from its records the disciplinary warning given Billie Hawkins on February 8, 1974.

I shall also recommend that Respondent be ordered to revoke or rephrase its no-solicitation rule, as published

in its employee handbook, in a manner consistent with this decision.

I shall also recommend that Respondent preserve and make available to the Board, upon request, payroll and all other records necessary to facilitate determination of the amount due under this Order.

In view of the nature of the unfair labor practices committed, I am of the opinion that the commission of similar unfair labor practices may be reasonably anticipated. I shall therefore recommend that Respondent be ordered to cease and desist from infringing in any manner upon the rights guaranteed its employees by Section 7 of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following:[6]

ORDER

Gould, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Maintaining and enforcing an illegal no-solicitation rule.

(b) Discharging any employee because of his union activity for the purpose of discouraging union or concerted activity protected by the Act.

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6. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objections thereto shall be deemed waived for all purposes.

(c) In any other manner interfering with, restraining or coercing employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activites for the purpose of collective bargaining or other mutual aid or protection.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer immediate reinstatement to James Anderson, Patricia Murphy, Brenda Lusk and Deborah Eller, to their respective former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, discharging, if necessary, anyone hired in their stead, and make each whole in the manner set forth in the section entitled, "The Remedy."

(b) Preserve and, upon request, make available to authorized agents of the Board, for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in computing the amount of backpay due or determining compliance with any provision hereof.

(c) Expunge from its records the warning given Billie Hawkins on February 8, 1974;

(d) Post in its plant in Cookeville, Tennessee, copies of the attached notice marked "Appendix."[7]

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7. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent, shall be posted by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

Dated at Washington, D.C.

/s/ George L. Powell
George L. Powell
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we have violated the law and has ordered us to post this notice.

WE WILL NOT maintain or enforce a no-solicitation rule made illegal because it does not clearly show that our employees are free to engage in union activities while on their own time even though on our property.

WE WILL NOT discharge any employee because he engaged in union or concerted activity for the purpose of collective bargaining or other mutual aid or protection.

Since the Board has found that we violated the law when we discharged James Anderson, Patricia Murphy, Brenda Lusk, and Deborah Eller, WE WILL offer them their respective jobs back (if not already reinstated), discharging their replacements if necessary, or if such jobs no longer exists, WE WILL offer them substantially equivalent employment, and WE WILL pay them for any loss of pay they may have suffered because we discharged them.

Since the Board has found that we violated the law when we issued a written warning to Billie Hawkins on February 8, 1974, concerning time in the restroom, WE WILL remove the warning from our records.

WE WILL NOT in any other manner, interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in such activities.

All our employees are free to become and remain or to refrain from becoming or remaining members of any labor organization.

Gould, Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peachtree Building Rm. 701, 730 Peachtree Street N.E., Atlanta Ga. 30308, (404) 526-5760.

No. 76-858

In the Supreme Court of the United States

OCTOBER TERM, 1976

GOULD, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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CARL L. TAYLOR,
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Deputy Associate General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A2) is not officially reported (see 542 F. 2d 1176). The decision and order of the National Labor Relations Board (Pet. App. A2-A32) are reported at 216 N.L.R.B. 1031.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1976. The petition for a writ of certiorari was filed on December 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's findings that petitioner discharged four employees because of their union activities.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. 2-3.

STATEMENT

Petitioner Gould, Inc. (the "Company") manufactures heating elements at a facility in Cookeville, Tennessee (A. 15).[1] By September 1973, the Company employed approximately 70 to 75 persons in its production and maintenance departments in Cookeville (A. 150). At least 52 of these employees had been hired under federally-funded job programs supervised by the Tennessee Industrial Training Service (A. 223). These programs required the Company to hire, train and maintain a work force made up of a high percentage of the "hardcore" unemployed (A. 150-151). In return, the federal government obligated itself to pay one-half of the salary of any employee hired under these programs for the duration of the employee's training (A. 150). To maintain its quota of "hardcore" employees, the Company found it necessary to relax some of its standards for employee conduct—in particular, its rules on tardiness and absenteeism (A. 138-139).

In June 1973, employee James Anderson began discussing union representation with other employees (A. 5, 16, 64). Anderson contacted the Union[2] on August 22, 1973, and arranged a meeting with union representatives at his home on August 26 (A. 16-17, 64). On August 30, Anderson and fellow employee David Mayberry met with union representative C. E. Strickland, signed cards

[1] "A." refers to the parties' printed appendix in the court of appeals. We are lodging a copy of this appendix with this Court.

[2] International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW.

authorizing the Union to act as their bargaining representative and agreed to distribute union literature to fellow employees (A. 17, 64). On September 11, a union organizational meeting was held at employee Patricia Murphy's apartment (A. 6, 17, 38, 46, 64-65, 92, 97, 105). This meeting was attended by employees Anderson, Mayberry, Murphy, Deborah Eller, Brenda Lusk and Billie Hawkins (A. 17, 38, 64-65, 105). At this meeting, Murphy, Eller, Lusk and Hawkins signed union authorization cards and promised to contact other employees to solicit their support for the Union (A. 17, 48, 65, 92-93, 97-98, 105-106). Thereafter, Anderson, Murphy, Lusk and Eller discussed the Union with other employees and actively solicited authorization cards on the Union's behalf (A. 65, 83, 92-93, 97-98, 105-106).

Shortly after James Anderson had begun to talk with fellow employees about the Union, the Company's Director of Personnel, Bobby Farris, asked Anderson whether he had heard any discussion in the plant concerning unionization (A. 5, 18, 64, 70, 78). When Anderson replied that he had heard some discussion of unionization, Farris asked him who was doing the talking (A. 5, 18, 70, 78). Anderson responded, "just employees in general." Farris then requested Anderson to report to him anything that he might overhear that would be of interest (A. 70, 79).

On September 14, three days after the first organizational meeting at Patricia Murphy's apartment, the Company's General Foreman, James Looper, entered Murphy's work area and said, "It's coming in, isn't it?" Murphy asked, "What's coming in?" Looper replied, "You know what I mean" (A. 6, 18, 93-94). On September 18, Looper approached Billie Hawkins at her work station and showed her an article about a plant where Looper had worked that had closed after a lengthy strike. After Hawkins read the article, Looper said that such closings are "what unions

cause." Looper then remarked that the Company knew "90 percent of what was going on in town at night" (A. 6, 18-19, 40-42, 50-54).

On Monday, September 17, near the end of James Anderson's shift, the Company's Superintendent of Manufacturing, Ray Bittner, called Anderson into his office and discharged him, stating, "[Y]ou don't meet our expectations" (A. 6, 20, 71, 206).[3] Bittner gave Anderson his check but, when Anderson asked for his vacation pay and termination slip, Bittner replied that neither was prepared and he would receive them in the mail (A. 20, 71). Anderson then asked Bittner what reason the Company expected to put on his termination slip (A. 6, 20, 71). Bittner stated he did not know (*ibid.*). Subsequently, Anderson received his termination notice, which listed two reasons not previously advanced by Bittner—(1) Anderson's job performance did not meet the Company's standards for machinists and (2) the flexatherm machine operator position Anderson had been hired for initially had not materialized (A. 20, 71, 234). Thereafter, a new trainee was hired to replace Anderson on the flexatherm machine (A. 187).

Anderson continued to solicit employees on behalf of the Union following his discharge (A. 18, 82-83). Shortly after Anderson's discharge, Superintendent of Manufacturing Bittner told employee David Mayberry to tell Anderson "to lay off what he was doing if he wanted to get a job in this town" because "Bill Leggitt[4] has a lot of friends" (A. 18, 82-83).

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[3]Anderson was hired in August 1972, as a flexatherm machine operator trainee at $2.25 per hour. He was given a raise to $2.50 per hour in June 1973, and received a third raise in July 1973 (A. 153). Anderson received compliments on his work and was never given a written warning (A. 21).

[4]Plant Manager Leggitt was the senior management official at the plant (A. 16).

Murphy, Lusk and Eller—all of whom had been hired through the federal jobs program to work in the Company's production department—were also discharged on September 17, 1973 (A. 21, 91, 97, 105). Each had received compliments from management concerning her work (A. 95, 103, 109-110, 131-132); none had ever been suspended or given a written warning, although all three had received counseling because of absenteeism, tardiness and leaving their work station (A. 22, 102, 109, 139-140, 211). The last counseling session took place in the Company's personnel office during the third week in August 1973 (A. 102, 108-109). At this meeting, Looper and Farris had talked with Eller and Lusk about their absenteeism and tardiness (A. 102, 108-109). But Looper had told Eller and Lusk at that meeting that they should not feel threatened by the meeting because matters had not reached the point where they would be discharged if they were tardy or absent one more time (A. 102, 108-109, 141). Thereafter, and until their sudden discharges four weeks later, each of the women's attendance records showed a marked improvement (A. 7, 22, 102-103, 109, 141, 151).

On Monday, September 17, at 8:00 in the morning, Looper went to Patricia Murphy's work station and told her to get her belongings, to be very quiet, and to come with him (A. 22, 94). He then led Murphy to the door, clocked her out, and told her that she had been terminated because of her attitude and conduct (*ibid.*). At about the same time, Looper, in similar fashion, terminated Brenda Lusk, telling her that she was being discharged because of her excessive absenteeism and tardiness (A. 22, 100). Deborah Eller, who was absent that day, came in the next morning and found her time card missing (A. 22, 107-108, 214). She went to her work station to get her personal belongings and then went to the cafeteria to wait for Looper. When Looper arrived, he told her that she had been terminated because of her absentee record (A. 107-108). As in Anderson's case, the Company had not prepared the official termination slips at the time of the discharges (A. 6, 21-22, 95, 101).

In finding that Anderson, Murphy, Lusk and Eller were discharged because of their union activities, the Board rejected the Company's contention that it had been unaware of the employees' union activities. The Board relied upon Personnel Director Farris's interrogation of Anderson concerning union activity in the plant, General Foreman Looper's conversation with Murphy concerning unionization, and Looper's remark to Billie Hawkins that the Company was aware of what was going on at night (Pet. App. A3-A4). The Board also noted (*id.* at A4-A5):

> In addition, the conclusion that [the Company] was aware of the union activities of the above-named individuals and was motivated to discharge them because of these activities is inescapable from the circumstances surrounding the discharges themselves: (1) 6 days after the employees met at Murphy's house to discuss the Union and sign authorization cards, and the Monday following Looper's late Friday afternoon inquiry of Murphy as to whether the Union was coming in, to which she gave an affirmative response, [the Company] chose to discharge four of the six employees in attendance at the union meeting at Murphy's house; (2) although the Administrative Law Judge found that [the Company] had a practice of discharging employees on Friday, these four individuals were all discharged on a Monday; (3) the termination slips had not been completed for any of the discharged employees at the time they were notified they were discharged, and Superintendent of Manufacturing Bittner told Anderson that he did not know what the reason for dismissal would be on that employee's termination slip when it was completed and mailed to him; and (4) Murphy and Lusk were led away from their work stations in an atmosphere of secrecy to be told they were going to be discharged, and Eller was told of her termination after being clocked out.

> Nor is the unusual procedure [the Company] followed in discharging the employees here explained by the seriousness of, or proximity to, the reasons asserted for their discharges. In every case, the reasons given had accumulated over a long period of time and in no instance had there been any serious recent derelictions on the part of the discharged individuals to incur the [Company's] further displeasure with their work habits or conduct. In fact, although [the Company] allegedly discharged Murphy, Lusk, and Eller because of excessive absenteeism and tardiness, all three had improved upon their absentee records just prior to their discharges. And although Anderson purportedly was discharged for poor job performance and lack of work, he was never given any warning about his work performance and had in fact been complimented about his work by several of the supervisors, and after his discharge a new individual was hired by [the Company] to fill his job classification. In these circumstances, we conclude, as did the Administrative Law Judge, that the reasons advanced by [the Company] to explain the discharges are not credible and are pretextual in nature.

The Board therefore ordered the Company, *inter alia*, to offer to reinstate the four employees and to compensate them for any loss in pay (Pet. App. A6-A7).[5] The court of appeals enforced the pertinent provisions of the Board's order (Pet. App. A1-A2).[6]

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[5]The Board also found that the Company had committed several additional unfair labor practices, and it included in its order provisions designed to deal with those practices (Pet. App. A6-A7; A. 28-30).

[6]The court declined to enforce that portion of the Board's order pertaining to the Board's finding that the Company had violated Section 8(a)(1) of the Act by "telling employees it could get them any benefits that the Union could" (Pet. App. A1-A2; footnote omitted).

ARGUMENT

The sole question presented is whether there is substantial evidence in the record as a whole to support the Board's findings that the four employees were discharged because of their union activities. That question does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491.

In any event, the evidence discussed above and in the decisions of the Board (Pet. App. A3-A5) and the Administrative Law Judge (Pet. App. A13-A20) amply support the Board's findings. Contrary to petitioner's suggestion (Pet. 10), the Board did not "base its findings solely upon the uncorroborated testimony of" the four discharged employees. The Board relied on statements of Company officials indicating their knowledge of union activity,[7] the timing of the discharges, and the failure of the Company's assigned reasons for the discharges to withstand scrutiny.

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[7]The Company complains that its own interested witnesses should have been credited because they passed a lie detector test. The Administrative Law Judge properly discounted this evidence, explaining (Pet. App. A24): "[The Company's] use of the lie detector is interesting, but due to the type questions used and polygraphs' general unreliability, I find it had little weight in the total evidence, and its conclusionary results are not adopted."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1977.

DOJ-1977-02